

The opinion in support of the decision being entered today was **not** written for publication in and is **not** binding precedent of the Board.

UNITED STATES PATENT AND TRADEMARK OFFICE

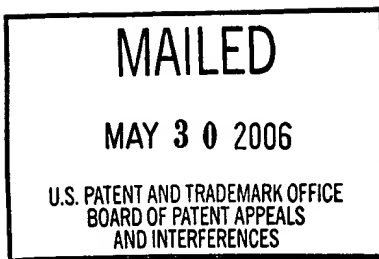
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BEFORE THE BOARD OF PATENT APPEALS  
AND INTERFERENCES

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**Ex parte** DONOVAN R. LANE

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Appeal No. 2006-0798  
Application No. 09/828,545

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ON BRIEF

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Before BAHR, NAPPI, and FETTING, **Administrative Patent Judges.**

FETTING, **Administrative Patent Judge.**

**DECISION ON APPEAL**

This is a decision on appeal under 35 U.S.C. §134 from the examiner's final rejection of claims 3 and 4. All of the remaining claims 1, 2 and 5 pending in this application are allowed.

We **AFFIRM.**

## **BACKGROUND**

The appellant's invention relates to a cartridge for a medicament. An understanding of the invention can be derived from a reading of exemplary claim 3, which is reproduced below.

3. An elongated tubular cartridge for containing a medicament, said cartridge including anterior and posterior ends and a plunger positioned within said cartridge; wherein said plunger is movable in said cartridge to dispense said medicament through said anterior end; wherein said cartridge further comprises an interior wall with tab means projecting into said cartridge from said interior wall; wherein said tab means is spaced a predetermined distance from said posterior end; and wherein said plunger is located between said tab means and said anterior end.

The prior art reference of record relied upon by the examiner in rejecting the appealed claims is:

Mikkelsen	5,984,900	Nov. 16, 1999
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Claims 3 and 4 stand rejected under 35 U.S.C. § 102(e) as being unpatentable over Mikkelsen.

Rather than reiterate the conflicting viewpoints advanced by the examiner and appellant/appellants regarding the above-noted rejection, we make reference to the examiner's answer (mailed December 16, 2003) for the reasoning in support of the rejection, and to appellant's brief (filed January 29, 2003) for the arguments thereagainst.

## OPINION

In reaching our decision in this appeal, we have given careful consideration to appellant's specification and claims, to the applied prior art reference, and to the respective positions articulated by appellant and the examiner. As a consequence of our review, we make the determinations that follow.

Appellant argues that Mikkelsen does not teach or suggest a cartridge for a medicament which includes a tab means in the interior of the cartridge as recited in the language of claim 3, and that the aspect of Mikkelsen most analogous to Appellant's cartridge is Mikkelsen's ampoule which has no tab. [See brief at page 4] .

The examiner responds that Mikkelsen's ampoule does contain a tab, embodied by a ring near reference number 19 in Fig. 1. The structure the examiner is referring to is more advantageously viewed in Fig. 2, although reference number 19 is not called out in that figure. Further, the examiner interprets Mikkelsen's housing, reference number 1 in Fig. 1, as a cartridge. [See answer at page 5].

We note that Mikkelsen's housing [1] is an elongated tubular cartridge that contains a medicament [col. 2 lines 22-24], the housing includes anterior [col. 2 lines 22-24, referred to as "distal end"] and posterior ends [col. 2 lines 49-53, referred to as "proximal end"] and a plunger [round member on the distal/anterior end of piston rod 35] positioned within the housing. The plunger is clearly movable in the housing to dispense the medicament through said anterior end.

Also, as the examiner has noted, there is a structure that is circular and is a predetermined distance from the posterior end and projects into the cartridge from the interior wall, and thus appears to respond fully to the "tab means" limitation of claims 3 and 4. We note that the claim limitation "tab means" has no function modifying it, and therefore it is not subject to the claim construction requirements of 35 U.S.C. § 112, sixth paragraph. The plunger is located between this tab means and the anterior end. We particularly note that neither claim 3 nor claim 4 requires any functional relationship between the tab means and the plunger, but only a positional relationship met by Mikkelsen. Accordingly we find that Mikkelsen does anticipate claims 3 and 4 and we therefore sustain the rejections of claim 3 and 4 under 35 U.S.C. § 102(e).

Only those arguments actually made by Appellant have been considered in this decision. Arguments which Appellant could have made but chose not to make in the brief or by filing a reply brief have not been considered and are deemed waived by Appellant (see 37 CFR § 41.37(c)(1)(vii)). Support for this rule has been demonstrated by our reviewing court in *In re Berger*, 279 F. 3d 975, 984, 61 USPQ2d, 1523, 1528-1529 (Fed. Cir. 2002), wherein the Federal Circuit stated that because the appellant did not contest the merits of the rejections in his brief to the Federal Circuit, the issue was waived.

**CONCLUSION**

To summarize, the decision of the examiner to reject claims 3 and 4 under 35 U.S.C. § 102(e) is affirmed.

No time period for taking any subsequent action in connection with this appeal may be extended under 37 CFR § 1.136(a)(1)(vii).

**AFFIRMED**

  
JENNIFER D. BAHR  
Administrative Patent Judge

  
ROBERT E. NAPPI  
Administrative Patent Judge

  
ANTON W. FETTING  
Administrative Patent Judge

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